8-16-2016

State v. Anderson Appellant's Brief Dckt. 43673

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43673**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY NO.**
v.	)	**CR 2014-22653**
	)	
DAROL KEITH ANDERSON,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

_____

HONORABLE JOHN T. MITCHELL
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

The State charged Darol Keith Anderson with five crimes relating to a domestic dispute with his wife, Erica Messerly. He pled not guilty and proceeded to trial. The jury found Mr. Anderson guilty of two of the five charges and acquitted him on the remaining three charges. The district court sentenced him to a unified term of imprisonment of ten years, with four years fixed.

Mr. Anderson raises two errors on appeal. First, he contends the district court erred by admitting Ms. Messerly's testimony from the preliminary hearing at trial, in violation of the Confrontation Clause of the Sixth Amendment and the rules of evidence. Second, he asserts the district court abused its discretion by admitting a police officer's testimony that vouched for Ms. Messerly's credibility. The State cannot prove these errors were harmless, and therefore the district court's judgment of conviction must be vacated and the case remanded for a new trial.

Statement of Facts and Course of Proceedings

According to the police reports, the charges against Mr. Anderson arose out of a domestic dispute between him and Ms. Messerly in the late evening of September 6, 2014, and again in the afternoon of September 7, 2014. (R., pp.12–17.) On September 6, Ms. Messerly started a fight with Mr. Anderson because she believed he was having an affair. (R., pp.12, 16–17.) She kicked him while he was asleep in their upstairs bedroom, and Mr. Anderson responded by reaching in the dark and grabbing her throat. (R., pp.12–13.) At one point, Mr. Anderson hit Ms. Messerly. (R., p.12.) The police reports further explain that they fought on and off throughout the night.

(R., pp.12–17.) Specifically, Ms. Messerly told police that Mr. Anderson threatened her with a metal pipe and a knife. (R., pp.12–13.) On the next day, September 7, a neighbor Lawrence Preston called the police around 1:45 p.m. to report a domestic dispute. (R., pp.10–13.) Mr. Preston told police that he had just observed Mr. Anderson grab Ms. Messerly in the driveway and pull her backward, which prompted him to call the police. (R., p.13.)

In December of 2014, the State filed a Criminal Complaint alleging Mr. Anderson committed felony domestic battery and aggravated assault with a knife on September 6 and misdemeanor domestic battery on September 7. (R., pp.20–21.) The State later filed an Amended Criminal Complaint adding the crime of attempted strangulation on September 6. (R., pp.40–42.)

The magistrate held a preliminary hearing in February of 2015. (R., pp.43–49.) Ms. Messerly testified. (*See generally* Court's Ex. 4,[1] p.5, L.1–p.41, L.22.) She claimed Mr. Anderson started choking and hitting her after she kicked him off the bed. (Court's Ex. 4, p.6, L.21–p.12, L.7.) She testified that he also punched her and threw her against the wall, which knocked her out. (Court's Ex. 4, p.15, Ls.1–19.) She explained that she escaped to her neighbor Amy's house, but then came back home later that night with Amy's boyfriend.[2] (Court's Ex. 4, p.15, L.20–p.17, L.19.) When she returned, she claimed that Mr. Anderson threatened her with a metal pipe and a knife and bit her.[3] (Court's Ex. 4, p.17, L.20–p.22, L.9.)

[1] Court's Exhibit 4 is the transcript of the preliminary hearing admitted at trial.
[2] Amy's boyfriend is not the same neighbor as Mr. Preston.
[3] Amy's boyfriend allegedly went with Ms. Messerly back to her house during the late evening of September 6, early morning of September 7, before Ms. Messerly allegedly got threatened by the metal pipe and knife by Mr. Anderson. (Court's Ex. 4, p.16, L.10–

At the end of the preliminary hearing, the State moved to amend the complaint again to add another count of aggravated assault on September 6 for the metal pipe. (R., p.48.) The magistrate permitted the amendment and found probable cause for all five offenses. (R., pp.48–49, 50.) Mr. Anderson was bound over to district court. (R., p.50.) The State subsequently filed an Information charging Mr. Anderson with the four offenses from September 6 (felony domestic battery, aggravated assault with the knife, aggravated assault with the metal pipe, and attempted strangulation) and one count of misdemeanor domestic battery on September 7. (R., pp.67–69.) Mr. Anderson pled not guilty. (R., p.65.) The district court set a jury trial starting on July 20, 2015. (R., p.65.)

A few days prior to trial, on July 16, 2015, the State filed a motion in limine to declare Ms. Messerly unavailable due to mental illness and to allow the admission of her testimony from the preliminary hearing at trial. (R., pp.117–18.) The State did not claim that Ms. Messerly was incompetent or unable to be located for trial. Rather, the State claimed testifying would pose a potential risk to Ms. Messerly's mental health. (R., pp.117.) The State attached an affidavit of Eric Heidenreich, M.D. (R., pp.119–20.) He wrote:

> 1. I am a medical doctor licensed to practice medicine in the State of Idaho, and employed by Kootenai Behavioral Health Center (KBH);

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p.17, L.19, p.26, Ls.6–7 (Ms. Messerly testifying that these events occurred from 10:00 p.m. on September 6 until 2:00 or 3:00 a.m. on September 7), p.30, L.23–p.40, L.25.) In contrast, Mr. Preston told the police and testified that he observed Mr. Anderson grab Ms. Messerly during the afternoon of September 7 when he was making lunch. (R., p.13; Tr. Vol. I, p.154, L.9–p.166, L.23.) Mr. Preston did not provide any information to the police or testimony regarding the events of September 6. (R., p.13; *see generally* Tr. Vol. I, p.148, L.23–p.169, L.3.)

2. That Erica Messerly is currently, and has been a patient at KBH since 6/19/2015;

3. That I have examined Ms. Messerly and have had multiple opportunities to observe her and interact with her over the past few days;

4. I have diagnosed Ms. Messerly with significant mental illness, specifically a co-morbid diagnosis of Post-Traumatic Stress Disorder ["PTSD"] and Substance Use Disorder;

5. Ms. Messerly is discharging from KBH's Chemical Dependency program today and transitioning into a new living environment, which fact has her feeling very emotionally unsteady;

6. Ms. Messerly presents as tearful and emotionally labile;

7. It has been my observation, and that of my staff, that any significant emotional distress typically is followed by Erica decompensating, which in turn, increases her risk for relapse in the context of her addiction to controlled substances;

8. I understand that Ms. Messerly is scheduled to testify in the above-captioned case in the near future;

9. Ms. Messerly's prognosis is poor to begin with and I would anticipate having to testify would result in further deterioration of her current, already fragile condition;

10. Testifying would put Ms. Messerly at substantial risk for relapse on controlled substances and pose a significant risk to her mental health;

11. I emphatically recommend that Ms. Messerly not testify at this time or any in the near future;

12. Further, your Affiant sayeth naught.

(R., pp.119–20.)

On the morning of trial, the district court took up the State's motion.[4] (*See generally* Tr. Vol. I,[5] p.4, L.18–p.5, L.4, p.9, L.7–p.36, L.18.) The State presented

[4] The issue of Ms. Messerly's presence at the trial was also briefly discussed at a pretrial conference on July 15 and status conference on July 16. (R., pp.115–16, 122.) The State requested a continuance or delay, which the district court denied.

testimony by Lisa Bunker, a clinical manager of KBH's Chemical Dependency Unit. (Tr. Vol. I, p.9, L.16–p.19, L.17.) Ms. Bunker said that Ms. Messerly's mental state was "very fragile" and testifying would "re-traumatize her at this point in time." (Tr., p.13, Ls.14–22.) Ms. Bunker also said that Ms. Messerly could "decompensate" if she were to testify. She defined "decompensate" as:

> From a mental health standpoint, it's when we stabilized somebody psychiatrically, we've got them on the correct medications, and we – emotionally they are less vile [sic] and are able to tolerate some emotional regulation. It would be – yes, that's what decompensation – and decompensation is – is when their fragile system in the case of Miss Messerly it would be her fragile – her fragile mental health status falling apart due to – due to something emotionally triggering it.

(Tr. Vol. I, p.14, Ls.2–10.) Ms. Bunker could not say with certainty that Ms. Messerly would decompensate, but instead said:

> It's possible, however, I think she will – this – revisiting this kind of trauma will – will always likely potentially give Miss Messerly the possibility of decompensation. It's tenuous regardless of if it's in a year or six months. Dr. Heidenreich's statement in one letter, if you read it said if testimony was necessary – he was saying is there any way this could happen without her.

(Tr. Vol. I, p.16, Ls.13–19.) Ms. Bunker could not give an exact date when Ms. Messerly would be stabilized, but possibly in the "next few months." (Tr. Vol. I, p.15, L.20–p.16, L.4.) She also explained that the "first 90 days" were "a really important time in a person's early recovery" so she would "have the psychiatrist[ ] evaluate her mental

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(R., pp.115–16, 122.) The district court reserved ruling on Ms. Messerly's unavailability and the admission of the preliminary hearing transcript until the morning of trial. (R., pp.115–16, 122.)

[5] There are three transcripts on appeal. The first, cited as Volume I, contains the first day of the jury trial, held on July 20, 2015. The second, cited as Volume II, contains additional proceedings from the first day of the jury trial. The third, cited as Volume III, contains the second day of the jury trial, held on July 21, 2015, and the sentencing hearing, held on September 15, 2015.

health professionals evaluate her [sic] to see what in 90 days it looks like for her." (Tr. Vol. I, p.17, L.20–p.18, L.2.) Overall, Ms. Bunker concurred with Dr. Heidenreich's recommendations. (Tr. Vol. I, p.17, Ls.4–10.)

Mr. Anderson argued against the admission of Ms. Messerly's preliminary hearing testimony based on Idaho Rule of Evidence 804 and the "right of confrontation." (Tr. Vol. I, p.20, L.16–p.32, L.3.)

The district court granted the State's motion, finding Ms. Messerly was "unavailable," a continuance was "not a practical option,"[6] and Mr. Anderson had an adequate opportunity for cross-examination at the preliminary hearing. (Tr. Vol. I, p.32, L.4–p.34, L.12.) The district court determined that "the right of confrontation has not been compromised." (Tr. Vol. I, p.33, Ls.19–20.) The district court also noted:

> It hasn't been discussed in the cases, at least none of the ones I could see, but it does seem to me to be unfair to the witness and alleged victim when it is certainly possible that the conduct of Mr. Anderson had something to do with her instability, her PTSD, and even if she show was diagnoses previous [sic], people[ ] can be traumatized more than one time. So, I'm not finding that the unavailability was due to Mr. Anderson's actions, but I think it is quite possible that Miss Messerly's unavailability is due in part to Mr. Anderson's back on September 6th, 2014. But that's just more of a fairness issue.

(Tr. Vol. I, p.33, L.21–p.24, L.6.) From a "technical standpoint," however, the district court concluded Ms. Messerly was "unavailable and will be for the foreseeable future." (Tr. Vol. I, p.34, Ls.6–11.)

The trial began shortly thereafter. (*See generally* Tr. Vol. I, p.28, L.14–p.139, L.11 (voir dire and jury selection); Tr. Vol. II, p.7, L.11–p.20, L.4 (preliminary jury

[6] The Information was filed on April 13, 2015. The trial began on July 20, 2015, but, as stated by Mr. Anderson, "[s]peedy trial runs in October" of 2015. (Tr. Vol. I, p.32, Ls.19–20.) *See also* I.C. § 19-3501.

instructions read).) The State called two witnesses in its case-in chief: Mr. Preston and Officer Mortensen, who responded to Mr. Preston's police call on September 7. (Tr. Vol. I, p.148, L.23–p.169, L.3 (neighbor's testimony), p.172, L.21–p.196, L.8 (police testimony).) In addition, the district court admitted photographs of Ms. Messerly's injuries taken by Officer Mortensen on September 7. (Tr. Vol. I, p.181, L.24–p.185, L.14; State's Exs. 1–13.) Finally, the State read Ms. Messerly's testimony from the preliminary hearing to the jury.[7] (Tr. Vol. I, p.196, L.18–p.198, L.1; *See* Court's Ex. 4.).

Mr. Anderson called three witnesses, all of whom testified to the events of September 7. (Tr. Vol. I, p.198, L.5–p.225, L.4.)

On the second day of trial, Mr. Anderson testified in his defense. (Tr. Vol. III, p.14, L.1–p.36, L.20.) He testified that, on September 6, he woke up in the middle of the night to Ms. Messerly kicking and screaming at him. (Tr. Vol. III, p.14, L.24–p.15, L.21.) He responded by "reach[ing] for the voice" and grabbing her throat. (Tr. Vol. III, p.15, L.22–p.17, L.13.) He testified that it was not intentional and he let go once he realized that he had grabbed her. (Tr. Vol. III, p.16, L.19–p.17, L.13.) Ms. Messerly followed him downstairs. (Tr. Vol. III, p.17, Ls.14–p.18, L.24.) She continued to fight and hit him. (Tr. Vol. III, p.18, L.25–p.21, L.4.) Ms. Anderson admitted he hit her, which knocked her out. (Tr. Vol. IIII, p.21, Ls.5–6.) He explained that he did it because: "I couldn't get up. I couldn't move. She just – I mean she was just – I felt like I was just – I couldn't get out of there." (Tr. Vol. III, p.21, Ls.8–10.) Mr. Anderson testified that he and Ms. Messerly

[7] At trial, certain parts of Ms. Messerly's testimony from the preliminary hearing were not read to the jury. These redactions were blacked-out or crossed-out in the transcript. The redactions include: p.7, L.8–p.8, L.9, p.10, Ls.17–8, p.10, L.20–p.11, L.22, p.12, L.21–p.14, L.25, p.20, Ls.6–12, p.22, L.24–p.23, L.4, p.40, Ls.5–9. (*See* Court's Ex. 4.)

continued to fight on and off throughout the night, but he did not physically harm her again. (Tr. Vol. III, p.21, L.18–p.29, L.4.) When asked if he attempted to strangle Ms. Messerly, Mr. Anderson answered, "No. It was not thought through at [sic] any means. It was – I was protecting myself. I didn't even know who it was." (Tr. Vol. III, p.29, Ls.10–14.) He also denied threatening her with a knife and striking her with a metal pole. (Tr. Vol. III, p.29, Ls.17–21.) He testified that any physical contact with her was in self-defense. (Tr. Vol. III, p.29, L.22–p.30, L.4.)

The defense rested after Mr. Anderson's testimony. (Tr. Vol. III, p.36, L.24.) The State did not call any rebuttal witnesses. (Tr. Vol. III, p.37, Ls.1–3.) In closing argument, Mr. Anderson argued Ms. Messerly's story was neither credible nor consistent in many respects and Mr. Anderson acted in self-defense. (Tr. Vol. III, p.67, L.21–p.74, L.17.) The jury was given instructions on self-defense for battery. (R., pp.188–89).

The jury found Mr. Anderson guilty of the September 6 felony domestic battery and the September 7 misdemeanor battery. (Tr. Vol. III, p.87, Ls.3–22.) The jury found Mr. Anderson not guilty of September 6 aggravated assault with the knife, aggravated assault with the metal pipe, and attempted strangulation. (Tr. Vol. III, p.87, Ls.3–22.) The district court sentenced Mr. Anderson to ten years, with four years fixed, for felony domestic battery. (R., pp.211–16; Tr. Vol. III, p.93, L.1–p.121, L.24 (sentencing hearing).) Mr. Anderson filed a timely Notice of Appeal from the district court's Judgment. (R., pp.213–16, 220–22.)

ISSUES

1. Did the district court err by admitting Ms. Messerly's testimony from the preliminary hearing at trial, in violation of Mr. Anderson's Sixth Amendment right to confrontation and the Idaho rules of evidence?

2. Did the district court abuse its discretion by admitting the police officer's testimony vouching for Ms. Messerly's credibility?

ARGUMENT

I.

The District Court Erred By Admitting Ms. Messerly's Testimony From The Preliminary Hearing At Trial, In Violation Of Mr. Anderson's Sixth Amendment Right To Confrontation And The Idaho Rules Of Evidence

A. Introduction

Mr. Anderson asserts the district court violated his Sixth Amendment right to confront the witnesses against him by admitting Ms. Messerly's testimony from the preliminary hearing at trial. For similar reasons, he contends the district court erred by admitting her testimony pursuant to Idaho Rules of Evidence ("I.R.E."). As required by the Confrontation Clause and I.R.E. 804, a witness must be "unavailable" to admit the witness's prior testimony. This requirement was not met here. Ms. Messerly was available to testify. Therefore, it was error for the district court to admit her testimony from the preliminary hearing at trial.

B. Standard Of Review

The district court's decision to grant or deny a motion in limine is reviewed for an abuse of discretion. *State v. Richardson*, 156 Idaho 524, 527 (2014) "A trial court does not abuse its discretion if it (1) recognizes the issue as one of discretion, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason." *Id.* (quoting *State v. Guess*, 154 Idaho 521, 528 (2013)). Questions of law are reviewed de novo. *Id.*

C. The District Court Erred By Admitting Ms. Messerly's Prior Testimony At Trial Because She Was Not Unavailable To Testify

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (alternation in original) (quoting U.S. CONST. amend. VI). "The Confrontation Clause 'is made obligatory on the States by the Fourteenth Amendment.'" *Richardson*, 156 Idaho at 528 (quoting *Pointer v. Texas*, 380 U.S. 400, 403 (1965)).

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, "the greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE § 1367 (3d ed. 1940)). Thus, the Confrontation Clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Richardson*, 156 Idaho at 528 (quoting *Davis v. Washington*, 547 U.S. 813, 821 (2006)). The term "testimonial" applies to preliminary hearing testimony. *Crawford*, 541 U.S. at 42.

Turning to the rules of evidence, hearsay evidence is inadmissible except as provided by the I.R.E. or other rules promulgated by the Court. I.R.E. 802. I.R.E. 804 provides an exception to the hearsay rule. *Richardson*, 156 Idaho at 530. Similar to the Confrontation Clause, I.R.E. 804 allows the admission of former testimony by a witness if the witness is "unavailable" and "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or

redirect examination." I.R.E. 804(a), (b)(1). Preliminary hearing testimony is "former testimony" under I.R.E. 804(b)(1). *See Richardson*, 156 Idaho at 528.

The Confrontation Clause and I.R.E. 804 are "not co-extensive," but they "serve to protect similar values." *State v. Bagshaw*, 137 Idaho 613, 616 (Ct. App. 2002). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). "[S]ubject to limited exceptions," "both of these rules of law seek . . . to preserve the opportunity for cross-examination of persons whose declarations are placed before the fact-finder and to aid the fact-finder's ability to assess the declarant's credibility by viewing that individual as the testimony is given." *Bagshaw*, 137 Idaho at 616.

1. Ms. Messerly Was Not "Unavailable" Under The Confrontation Clause Or I.R.E. 804

I.R.E. 804 "directs that a witness may be deemed unavailable if he or she 'is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.'" *State v. Perry*, 144 Idaho 266, 269 (Ct. App. 2007) (quoting I.R.E. 804(a)(4)). "A witness is not 'unavailable,' however, merely because he or she cannot be present on a particular day. Rather, the unavailability 'must be of such duration that a continuance is not a practical alternative.'" *Id.* (quoting *State v. Button*, 134 Idaho 864, 868 (Ct. App. 2000)). The proponent of the testimony has the burden to establish unavailability. *Id.*

For Confrontation Clause purposes, "[i]n the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or

demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), *overruled on other grounds by Crawford*, 541 U.S. 36. When the State claims that it could not locate or procure a witness for trial, the test for unavailability is "whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Id*. at 74. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Id.* (quoting *Green*, 399 U.S. at 189 n.22 (Harlan, J., concurring)). In *Bagshaw*, the Court of Appeals referenced this test to determine whether a witness was unavailable due to her pregnancy. 137 Idaho at 616. Specifically, the defendant in *Bagshaw* argued the State did not meet the reasonableness standard because the witness would be available after the delivery of her child and thus the trial should have been postponed "for a matter of a few months." *Id.* Ultimately, the Court of Appeals did not need to address the defendant's argument to resolve the issue. *Id.* at 616–17.

Unlike *Bagshaw*, Mr. Anderson is not arguing the State failed to make "good faith efforts" to locate and procure Ms. Messerly for trial. Nor is Mr. Anderson claiming the trial should have been postponed. Rather, Mr. Anderson asserts Ms. Messerly's mental illness was not so severe as to render her unavailable to testify at trial.

There are no Idaho appellate decisions on unavailability and mental illness, but cases from other jurisdictions provide guidance. "As to severity, mental illness itself may not automatically render a witness unavailable." *Burns v. Clusen*, 798 F.2d 931, 938 (7th Cir. 1986) (citation omitted). In criminal cases with a victim, there is always a possibility that it will be challenging, uncomfortable, or even traumatic for the victim to

recount the experience. The fact that "witnesses are likely to suffer adverse emotional or psychological effects as a result of testifying against their assailants" does not satisfy "unavailability." *Warren v. United States,* 436 A.2d 821, 829 (D.C. 1981). All victims of violent crimes may suffer emotional trauma, but only those that "may suffer far greater anguish than normally accompanies court appearances" can be deemed unavailable. *Burns*, 798 F.2d at 938. What is more, "[a] declaration that a witness is 'unavailable' because of mental disability cannot be a 'back-door' acknowledgment that a witness is simply reluctant or likely to refuse to testify." *Id.* at 942. Therefore, only "extreme circumstances" presenting "grave risks to the witness' psychological health justify excusing her [or his] live in-court testimony." *Warren*, 436 A.2d at 829.

Further, the risk of harm to a witness must be weighed against the purpose of the Confrontation Clause—it "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. *Cf.* 2 MCCORMICK ON EVIDENCE § 253 at 169 (6th ed. 2006) ("Under the influence of the Confrontation Clause, a higher standard of disability may be required in criminal cases for witnesses testifying against the accused."). Thus, although it may be difficult for victims to face their accusers, the fundamental right of cross-examination should not be sidelined to protect against the risk of exposing a witness to mental distress.

Here, Ms. Messerly was not "unavailable" to testify based on her mental illness. Ms. Messerly was diagnosed with PTSD and substance use disorder. (R., p.119.) These mental health issues do not satisfy "extreme circumstances" to excuse her from testifying. *See Warren*, 436 A.2d at 830–31 ("expert testimony . . . established that there

was both a high likelihood of temporary psychological injury, perhaps even psychosis, and a possibility of permanent psychological injury"); *see also People v. Lyons*, 907 P.2d 708, 711 (Colo. Ct. App. 1995) (witness not unavailable under confrontation clause due to witness in postpartum period and "may get tearful in speaking about things . . ."). Ms. Messerly was not committed to a psychiatric hospital or diagnosed with any psychotic disorders. In fact, she was discharged from KBH. (R., p.120.) There was no evidence that Ms. Messerly's memory was impaired or distorted by her mental health issues. There was no evidence that she refused to testify or would not appear at trial. There was no evidence that she was suicidal or a danger to others. There was no evidence of permanent psychological damage if she testified. There was no evidence that any temporary psychological effect could not be reversed through her treatment with KBH. In all, the possible harm to Ms. Messerly fell in the category of the normal and expected "adverse emotional or psychological effects" or "anguish" due to the nature of the proceedings. *Warren,* 436 A.2d at 829; *Burns*, 798 F.2d at 938.

As explained by Ms. Messerly's mental health providers, there was a risk that Ms. Messerly could relapse or regress in her mental health treatment. But the risk of "decompensation" does not prevail over the legal principles embodied in the Confrontation Clause and I.R.E. 804—ensuring the reliability of evidence and assessing witness credibility through "the crucible of cross-examination." *See Crawford*, 541 U.S. at 61; *Bagshaw*, 137 Idaho at 616. The State did not meet its burden to establish that Ms. Messerly would experience substantial trauma or "grave risks" to her mental health. And the district court did not act consistently with the applicable legal standards by

declaring Ms. Messerly unavailable. Therefore, the district court erred by finding Ms. Messerly unavailable under the Confrontation Clause and I.R.E. 804(a)(4).

2. The Error In Admitting Ms. Messerly's Testimony Was Not Harmless

The State has the burden to establish the admission of Ms. Messerly's testimony from the preliminary hearing was harmless. *See State v. Almaraz*, 154 Idaho 584, 598 (2013). The State must prove, beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained. *See State v. Moses*, 156 Idaho 855, 867 (2014). Further, "[i]n determining whether the constitutional error was harmless beyond a reasonable doubt, the issue 'is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand.'" *State v. Thomas*, 157 Idaho 916, 919 (2015) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

The State cannot meet its burden in this case. Ms. Messerly's testimony was vital to proving the September 6 charge of felony domestic battery. The State's evidence against Mr. Anderson for the September 6 charge consisted solely of Ms. Messerly's testimony and Officer Mortensen's observations and photographs of Ms. Messerly after-the-fact on September 7. (*See* Tr. Vol. I, p.176, L.1–p.196, L.8 (police officer testimony); State's Exs. 1–13.) No one besides Ms. Messerly, and later Mr. Anderson in his defense, testified as to the events of September 6. Thus, the State cannot prove Ms. Messerly's testimony did not contribute to the jury's guilty verdict on the September 6 charge.

II.

The District Court Abused Its Discretion By Admitting Officer Mortensen's Testimony Vouching For Ms. Messerly's Credibility

A. Introduction

In the State's case-in-chief, Officer Mortensen testified regarding his interaction with Ms. Messerly on September 7. Officer Mortensen not only described the injuries he saw on Ms. Messerly, but also opined her injuries were "consistent" with her story. Mr. Anderson asserts it was error for the district court to allow Officer Mortensen's testimony on Ms. Messerly's "consistent" story. This testimony vouched for her credibility, which was improper under the rules of evidence.

B. Standard Of Review

"The district court has broad discretion in the admission and exclusion of evidence and its decision to admit such evidence will be reversed only when there has been a clear abuse of that discretion." *State v. Perry*, 139 Idaho 520, 522 (2003).

C. The District Court Abused Its Discretion By Admitting Officer Mortensen's Testimony Because One Witness Cannot Vouch For The Credibility Of Another

The State called Officer Mortensen to testify regarding his investigation on September 7. (Tr. Vol. I, p.176, L.1–p.178, L.5.) Officer Mortensen testified that he was dispatched to Mr. Anderson and Ms. Messerly's home after Mr. Preston called the police. (Tr. Vol. I, p.177, L.8–p.178, L.5.) Without discussing the content of their conversation, Officer Mortensen testified that he talked to Ms. Messerly "about what had happened" on September 6 and 7. (Tr. Vol. I, p.179, Ls.14–24.) He also testified that he observed injuries on Ms. Messerly. (Tr. Vol. I, p.179, L.25–p.180, L.2.) Pictures of

Ms. Messerly's injuries, taken by Officer Mortensen on September 7, were admitted into evidence. (Tr. Vol. I, p.181, L.13–p.185, L.15; State's Exs. 1–13.)

During direct examination, the State asked Officer Mortensen to describe Ms. Messerly's injuries. (Tr. Vol. I, p.180, Ls.3–4.) With each description, Officer Mortensen also testified that Ms. Messerly's injury "was consistent" with her story to him. (Tr. Vol. I, p.180, L.3–p.181, L.8.) For example, Officer Mortensen testified that he observed a "cut on her nose" and eyes "starting to blacken," "which was consistent with what she told me had happened." (Tr. Vol. I, p.180, Ls.3–16.) He also testified that a neck bruise was "also consistent," a bite mark was "also consistent," and stomach bruise was "also consistent." (Tr. Vol. I, p.180, L.17–p.181, L.4.) Mr. Anderson objected each time to the use of "consistent" as "vouching for someone's credibility." (Tr. Vol. I, p.180, L.13–p.181, L.6.) The district court overruled Mr. Anderson's objections. (Tr. Vol. I, p.180, L.13–p.181, L.6.)

The Idaho Supreme Court "has repeatedly recognized that a lay or expert witness cannot give an opinion of another witness's credibility or encroach on the fact-finding functions of the jury." *State v. Parker*, 157 Idaho 132, 148 (2014).

> The Supreme Court of the Territory of Idaho stated over one-hundred years ago, that a question calling "for the opinion of one witness as to the truthfulness of another . . . is clearly an invasion of the province of the jury, who are the judges of the credibility of witnesses."

State v. Perry, 150 Idaho 209, 229 (2010) (quoting *People v. Barnes*, 2 Idaho 148, 150 (1886)). "Lay witnesses are not permitted to testify as to matters of credibility." *Id.* (citing *Reynolds v. State*, 126 Idaho 24, 30–31 (Ct. App. 1994)). Likewise, "expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does

not assist the trier of fact as required by Rule 702." *State v. Perry*, 139 Idaho at 525 (internal quotations omitted) (quoting *United States v. Charley*, 189 F.3d 1251, 1267 (10th Cir. 1999)). Thus, the Court has "routinely held that 'an expert's opinion . . . is admissible up to the point where an expression of opinion would require the expert to pass upon the credibility of witnesses or the weight of disputed evidence. To venture beyond that point, however, is to usurp the jury's function.'" *Almaraz*, 154 Idaho at 559–600 (quoting *Perry*, 139 Idaho at 525).

Here, Officer Mortensen's testimony on Ms. Messerly's "consistent" story did "nothing but vouch" for her credibility. In *State v. Ehrlick*, 158 Idaho 900 (2015), for example, a police officer testified regarding his investigation of leads by other witnesses who reported seeing the victim on a certain date. *Id.* at 909–10. The police officer testified that the witnesses gave "inconsistent" statements and the witnesses' sightings of the victim were not credible. *Id.* at 910. The Court held, "This testimony, offered by the prosecution, and permitted by the district court despite repeated objections, directly related to the credibility of witnesses and encroached on the jury function to assess witness credibility." *Id.* As in *Ehrlick*, a similar error occurred here. Officer Mortensen's testimony informed the jury that Ms. Messerly was truthful and her recollection of the events of September 6 and 7 was credible. "[S]tatements by a witness as to whether another witness is telling the truth are prohibited." *Perry*, 139 Idaho at 525 (alteration in original) (quoting *State v. Allen*, 123 Idaho 880, 885 (Ct. App. 1993)). Thus, Officer Mortensen's vouching for Ms. Messerly's credibility was impermissible under the rules of evidence. The district court's admission of Officer Mortensen's testimony was

"inconsistent with the governing legal standard" on credibility determinations and thus an abuse of discretion. *See Ehrlick*, 158 Idaho at 910.

Mr. Anderson objected to Officer Mortensen's testimony, so the State has the burden to show the erroneous admission of Officer Mortensen's testimony was harmless. *Perry*, 150 Idaho at 221 (harmless error standard applies to objected-to errors). "To establish harmless error, the State must prove 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Ehrlick*, 158 Idaho at 911 (quoting *Perry*, 150 Idaho at 221). The State cannot meet this burden. Credibility determinations were central to this case. As discussed in Part I.C.2, Ms. Messerly's testimony was essential to the State proving the September 6 felony domestic battery charge. Whether Mr. Anderson committed an unjustified battery against Ms. Messerly or acted in self-defense came down to a credibility determination between Mr. Anderson and Ms. Messerly. Because Ms. Messerly did not testify at trial, the jury had no way to assess her demeanor and minimal information to determine her credibility—except, of course, the opinion of Officer Mortensen. The State cannot prove Officer Mortensen's vouching for Ms. Messerly's credibility did not contribute to the guilty verdict on the September 6 charge.

III.

The Errors In The Aggregate Deprived Mr. Anderson Of A Fair Trial

"Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial." *State v. Adamcik*, 152 Idaho 445, 483 (2012); *see also State v. Shackelford*, 150 Idaho 355, 385–86 (2010). Although Mr. Anderson maintains the State cannot prove these two errors were

harmless individually, Mr. Anderson also asserts the accumulation of the errors deprived him of a fair trial, thus violating his due process rights.

CONCLUSION

Mr. Anderson respectfully requests that this Court vacate his judgment of conviction and remand his case for a new trial.

DATED this 16th day of August, 2016.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of August 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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_____/s/_____
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JCS/eas